FAMILY LAWYERS ASSOCIATION
DISCUSSION PAPER RE: DOMESTIC TARIFF REFORM

The Family Lawyers Association appreciates and supports the significant improvements made to the Child Protection tariff in November 2014 and the financial eligibility expansion initiatives. In expanding the types of cases that will be covered by LAO in the domestic sphere, however, there is no corresponding increase in the tariff hours and there is a pressing need for more adequate tariff hours.

Almost by definition, cases that are either legally complex or complex due to the clients, require additional time.

There have been several amendments to the Rules and the legislation since the current tariff hours were set that increase the amount of time spent even in a relatively straightforward case, and the tariff is quite inadequate for the complex cases. Some examples:

- The parenting affidavits now required in every case adds additional interview and drafting time in all cases. Where the application is brought by a non-parent, there is considerable additional work.

- Recent amendments to the Financial disclosure requirements under the Rules require an additional document in all cases, and significantly more documentation where there is a property claim, plus the new NFP comparison form required for each Case or Settlement Conference.

- Focused hearings are now codified in Rule 1.7, although they were previously ordered under Rule 2. While they are a type of trial, they are quite different from the traditional trial that the tariff is geared towards. Additional preparation time is required to save court time, which is the objective of the Rule, and the tariff needs to include a reasonable amount of time.

1. PROBLEMS WITH THE CURRENT TARIFF

a) Negatively Impacts Quality of Service and Punishes Those Providing Good Service

There is a direct negative impact on the quality of legal services by rewarding counsel who cut corners and do not take additional steps for which there is no additional hours allotment and financially punishes those who do not cut corners. It is noted that, in most letters denying a discretionary increase or allowing a partial discretionary increase, the legal aid personnel state that they are not saying that the work was not done or that it was not necessary but that they are not paying for it. The result of this is that conscientious counsel who do a good or even adequate job are forced to work for free.

Where conscientious counsel does take these and other additional steps for which there is no additional hours allotment, they are generally forced to request discretion in order to have all their hours paid. This has always been risky as to whether the additional work would be considered for a discretionary increase, and with the new Discretion Guidelines, it is far less likely that the additional time spent over the tariff maximums will be paid.

b) Lack of Accountability Within the Tariff Maximums

Under the current tariff, as long as the account submitted is at or under the total number of hours authorized by the certificate, there is little or no scrutiny of the work billed. This means there is little or no accountability as to how a lawyer spends those 12 to 16 hours initially authorized. This benefits lawyers who will not do work that is not covered by the hours authorized. We have seen cases where a lawyer will not go on the record or attend court all, but simply uses the 12 hours to give advice to the person to represent themselves.

The FLA has consistently advocated for an appropriate number of hours, but also with appropriate accountability for those hours.

c) **Encourages Litigation Drift**

The current tariff allows counsel to request additional hours for Case Conferences subsequent to the first and there is apparently no limit to the number of additional Case Conferences/Settlement Conferences and Trial Management Conferences. One cannot obtain any additional hours to bring a Motion, however, that needs to be done within the initial hours allotment or one may obtain an additional hours allotment for a substantially contested issue. We have seen this result in counsel arranging endless Case Conferences to the frustration of judges who give the same opinion to the parties over and over again as to how they would recommend the case be resolved, either on a temporary or final basis. The court cannot make an Order at a Case Conference, however, unless it is on consent.

If one party or the other is simply not prepared to listen to the recommendations, a Motion needs to be brought. The judge may tell the parties to bring a Motion but if counsel does not have the hours to do so, they may not.

d) **Appropriate Steps Not Taken**

There are no additional hours for important steps that are not necessary in every case but would certainly be warranted in many cases. The lack of sufficient hours and uncertainty of discretionary payment discourages counsel from taking these steps.

Some examples:

1) Questioning – This is rarely used in domestic proceedings because there are no additional hours available and it does take a significant amount of time to prepare for and attend on a questioning. This is certainly not necessary in every case but there are cases where questioning would greatly assist in obtaining necessary information and admissions and quite possibly lead to a resolution.

2) Motions – There are no additional hours for Motions which often results in endless Case Conferences being done with the hope that the parties will eventually heed the recommendations of the judge. This actually costs considerably more money than if one were able to obtain an additional hours allotment to bring a Motion or (or respond to one) after the first or at least second Case Conference, once all disclosure has been made. Such temporary Orders also frequently lead to a final Order either on the same terms or with some adjustment to accommodate any issues that have arisen with the temporary Order.

The FLA supports a limit on case conferences, with a maximum of two or three, and a minimum of one, being required before bringing a motion. If the matter is going to settle, at least on a temporary basis, it should normally be achieved within 2 case conferences, but a 3rd could be available if recommended by the case management judge or based on an opinion from the party's counsel.

3) Requests to Admit and Requests for Information – These are very useful in narrowing issues and promoting settlement but again, rarely used in Legal Aid files.

4) Settlement Negotiations – There is no additional hours allotment for settlement negotiations which can take a considerable amount of time but will save court resources when successful. Rather, the tariff encourages counsel to set the matter down for trial rather than continuing to attempt to find a resolution once the maximum hours available have been used up on interim steps. While still inadequate, the number of hours allotted for trial are considerably better.

e) Tariff has not recognized additional Work required by changes to Rules, Legislation and Judicial Practice

Where the Rules or legislative amendments impose additional work on counsel, additional time could, and should, be added to the tariff for that step. Some examples from recent years:

1) Additional hours are needed for the parenting affidavits – the FLA recommended one hour for parents and an additional 3 hours for a non-parent

2) Additional hours are needed to comply with the new financial disclosure requirements and new form for comparison of NFP.

3) The codified of the courts' ability to order focused hearings pursuant to Rule 1.7 has already led to a marked increase in proceeding in that manner. This is a valuable tool in allocating scarce court resources, and it is anticipated that this will lead to faster resolution and free up court time, increasing access to justice in a timely manner.

The existing tariff for trials does not adequately cover the preparation time required however. Additional hours for drafting affidavits to be used as direct evidence in focused hearings are needed, as well as additional hours to review the affidavits of other parties.

4) Increasingly, judges require written submissions rather than oral, especially after a lengthy trial over several non-consecutive days. This generally means no court time but substantially more preparation time. Since the current tariff provides for 4 hours per day of trial, there is no "trial day" upon which to obtain the preparation time for writing submissions, so counsel must ask for a discretionary increase.

TARIFF FOR SEPARATION AGREEMENTS

We were pleased with the initiative introduced July 3, 2014 that provides certificates for the negotiation of a separation agreement, but ten hours is often inadequate to complete an agreement. On the other hand, negotiations should not continue endlessly if little progress is being made.

The FLA supports a maximum of ten hours for negotiations, either prior to initiating an application or for out of court meetings, Offers to Settle, etc. during the course of negotiations. Additional hours should be available by prior authorization to continue negotiations rather than institute proceedings based on a lawyer's opinion, and based additional steps recommended with additional hours available on the same basis as where a file goes into litigation. For example, if a parenting assessment is required to resolve custody and access issues, additional time should be available for finding and determining the assessor, providing background documents and meeting with the assessor.

Alternatively, additional hours could be available where there is one issue that is more contested. For example, an additional hours allotment could be available where spousal support is in issue and more disclosure needs to be obtained and provided, such as a vocational assessment to assist in determining ability to become self-sufficient, but where all other issues are resolved.

Further, additional time should be allotted for the actual drafting of a Separation Agreement if settlement is achieved without going to court, and the FLA suggests that an additional four hours is appropriate.

The basic allotment without prior authorization for a separation agreement, no court proceedings, would therefore be 14 hours, with the ability to get more hours authorized. If no agreement is reached, and the lawyer does not feel that further negotiations will likely be productive, the client should be eligible for a litigation certificate.

THE HISTORIC LEGAL AID TARIFF

A similar discussion about the inadequacy of the maximum hours allowed by Legal Aid was happening in the early 1980's. This led to what is still the high-water mark in the tariff, the Legal Aid Tariff released in 1987. At that time, there was no tariff specifically for family law but rather one tariff for all civil matters;. Family law matters were also governed by the *Rules of Civil Procedure* and the rules of the then Ontario Court (Family Division) which is not the case today. The *Family Law Rules* and amendments have increased the amount of work and time required to complete a family law file. A proposal for a more reasonable tariff for domestic matters is attached. This uses a lot of the same categories as the 1987 tariff if they are still relevant today and adds some items that now exist that did not exist in 1987.

The 1987 tariff, of course, was severely decimated in the mid 1990's during the last major budget crisis. For approximately two years, only 6.5 hours were allotted at the commencement of a certificate and very few certificates were granted for family domestic matters. Certificates were still issued for child protection matters but also at a very low tariff.

When the current tariff was put into effect, they changed the system dramatically to simply allot a number of hours with a basic allotment of 12 hours. One can obtain additional hours for each Case or Settlement Conference, including some inadequate preparation time, but as indicated above, there are no additional allotments for Motions, questioning or preparing Requests for Information or Requests to Admit. The more contested a case is, the more likely it is that there will be one or multiple Motions and the need for serving documents such as the Request to Admit. One can only get a limited number of additional hours based on the number of contested issues, however, and even if you are able to get a double allotment, that may still be quite inadequate. This is particularly true with respect to custody where at a maximum you can get an additional 30

hours prior to the matter being set for trial.

3. SOME ALTERNATIVES FOR AN ADEQUATE TARIFF

a) Return to the 1987 Style Tariff

This has several advantages for clients, lawyers and the public purse.

1) Provided they allocate a reasonable number of hours for various steps, the lawyers will be able to do the work necessary and clients will get the necessary work done.

2) If the tariff is allocated by various steps, lawyers will actually have to do that work in order to get the additional hours. This would encourage counsel to take the steps that they may now avoid because there is no guarantee of payment. In the present system, the 12 hours allocated at the commencement of a file could be used simply to draft pleadings and if the case settled without the lawyer going to court, the lawyer could bill for 12 hours and would be paid without question since it is within the tariff maximums.

3) Legal Aid Ontario could better control its costs by requiring some steps to be preauthorized. Steps that are not required in every case such as Motion or questioning could require advance authorization.

There would need to be clear criteria for authorization, however. For example, Legal Aid Ontario could require that a Case Conference be held where the judge makes recommendations which the other party is not prepared to agree to before authorizing a Motion. If a client wished to move forward with a Motion for spousal support because they wanted the high range and not the low range offered,

if preauthorization was required for such a Motion, an LAO staff **lawyer** could determine whether or not it should be authorized. In a case where there was an absolute refusal to pay spousal support where there was clear entitlement, however, then the Motion should be authorized.

4) If preauthorization for these steps is required, the lawyer would have the advantage of knowing that it was covered and not having to take their chances on discretion.

The downside to the 1987 style tariff is that it will increase the amount of work required to prepare an account by dividing work up amongst the categories and perhaps more work in obtaining prior authorization.

b) Hours Allotment Based on Factors That Increase Time Required

An alternative would be to keep a system similar to what we have now, of additional hours being authorized for substantially contested issues, but also permitting the allocation of additional hours where some objective factors that increase the work required exist, or additional steps are authorized. The advantage to this would be that we could still obtain prior authorization. Some of the factors that might lead to additional hours being authorized are:

1) Multiple parties

Each additional party over the usual two in domestic files and three in child protection files adds more issues to be addressed, more other counsel or parties to communicate with and therefore requires more time.

2) Unrepresented parties

Where the opposing party is unrepresented or self-represented, most of the procedural work falls on the party who has counsel, including arranging adjournments, preparing and filing Form 14B motions and Confirmations, drafting and taking out Orders, and an additional 10-15 hours should be added.

3) Necessity of Bringing Motions

A lawyer should be able to write after a Case Conference and obtain an additional hours allotment to bring a Motion where the parties were unable to resolve the matter at the Case Conference. Motions certainly consume a lot of hours, particularly where “everything is an issue”.

4) Questioning

Where disclosure is not forthcoming voluntarily or there are complicated financial situations which require questioning, an additional hours allotment should be available. It should also be available in child protection proceedings where it is appropriate to question the worker.

5) Necessity of preparing Factums

Ten additional hours should be allotted where a factum is required by the court or counsel feels it is necessary.

6) Non-Parent Application

Where a non-parent is applying for custody, a significantly more involved affidavit is required, as well as police records checks and CAS Records checks, which requires at least an additional five hours.

7) Interpreter Required

Having to have questions and answeres communicated twice will obviously increase the amount of time required to conduct interviews. (This was a ground for the exercise of discretion, but has now been eliminated)

8) Additional hours should be added on the anniversary date of the certificate, similar to the system employed by the Office of the Children's Lawyer, particularly with respect to correspondence and communication with the client and other counsel.

9) The trial authorization should be increased to 6 hours per day of trial, the same as for child protection trials.

10) There should be additional time allotted for preparation for focused hearings, where counsel is required to prepare affidavits for their client's direct evidence and review the opposing party's affidavit, rather than hearing oral evidence. The OCL tariff allows an additional five (5) hours where evidence is being presented by affidavit.